No. 12,036

IN THE

United States Court of Appeals

For the Ninth Circuit

VICTOR J. VEATCH,
Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,
Appellee.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEE.

WALTER D. ACKERMAN, JR.,
Attorney General, Territory of Hawaii,
RHODA V. LEWIS,
Assistant Attorney General, Territory of Hawaii,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Contents

Table of Authorities Cited

Statutes

Other Authorities

No. 12,036

IN THE

United States Court of Appeals

For the Ninth Circuit

VICTOR J. VEATCH,
Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,
Appellee.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This appeal was taken on August 24, 1948, pursuant to 28 U.S.C.A. 225, now Section 1293 of the newly enacted Title 28 of the United States Code. The specification of errors and argument in the opening brief confine the case to No. 4 of the assignment of errors (R. 50). By elaboration in Assignments Nos. 6 and 13 (R. 50, 52) to which the specification of errors also refers, the appeal seeks to present a case involving the Hawaiian Organic Act (31 Stat. 141, c. 339) and the due process clause of the Constitution.

The record shows that the contention presented in Assignment No. 4 was presented in paragraph III of appellant's demurrer to the complaint against him (R. 7) and was preserved by him as Point No. 3 of the points of law appealed to the Supreme Court of the Territory of Hawaii (R. 19). The record further shows reliance by the appellant on the Hawaiian Organic Act and the due process clause of the Constitution both in the demurrer (Par. V, R. 8, and Par. XII, R. 9-10) and in the points on appeal (No. 5, R. 19, and No. 12, R. 21).

Appellee hereby submits that the appeal presents no substantial question.

STATEMENT OF THE CASE.

Appellee agrees with appellant's statement of the case, but supplements it by stating that the tax in question was imposed upon the gross compensation received by the appellant during the period October, 1944, to September, 1946, for services performed as an employee of the United States in a military reservation within the exterior boundaries of the Territory of Hawaii (R. 12). No tax was imposed by the Territory on any other income appellant may have, nor does the income so taxed antedate the effective date of either of the federal acts covering this precise situation, to wit, the Public Salary Tax Act and the Buck Act, below cited. There is but a single factual difference between this case and the *Yerian* case, decided

by this Court in 1942,[1] that is, that the taxpayer lives and works on a military reservation within the Territory. The Buck Act having been enacted for the express purpose of establishing, as a uniform rule, that such fact is immaterial to the validity of state and territorial taxes, an appeal based solely on such fact can only be classed as a frivolous appeal.

QUESTION INVOLVED.

Does the Territory of Hawaii have power to tax the gross compensation received by an employee of the United States during the period October, 1944, to September, 1946, for services performed by him in a military reservation within the exterior boundaries of the Territory where said employee was then living, he being, however, a domiciliary of the State of Colorado?

SUMMARY OF ARGUMENT.

The power of the Territory of Hawaii to impose the tax in question is beyond dispute under the Public Salary Tax Act of 1939 and the Buck Act enacted in 1940; and such power existed even in the absence of such statutes.

---

[1] *Yerian v. Territory*, 130 F.(2d) 786, (Sept. 8, 1942).

ARGUMENT.

I.

THE POWER OF THE TERRITORY OF HAWAII TO IMPOSE THE TAX IN QUESTION IS BEYOND DISPUTE, UNDER THE PUBLIC SALARY TAX ACT OF 1939, AND THE BUCK ACT ENACTED IN 1940.

Appellant concedes (as he necessarily must) that he is subject to the tax on his compensation received as an employee of the United States, if the Territory of Hawaii had jurisdiction to impose such tax (Br. pp. 6-7). Of course the Territory agrees that jurisdiction to tax is essential.

Jurisdiction to tax the income derived from services may be exercised by the state in which the employee is domiciled, or by the state in which he is employed, or by both. *Yerian v. Territory, supra,* and cases there cited (130 F. (2d) at p. 789), supporting the jurisdiction of the state in which the taxpayer is employed; *Lawrence v. State Tax Commission,* 286 U.S. 276, 52 S. Ct. 556, 72 L. ed. 1102, *New York ex rel. Cohn v. Graves,* 300 U.S. 308, 57 S. Ct. 466, 81 L. ed. 666, supporting the jurisdiction of the domiciliary state. That dual taxing jurisdiction may exist as to the same income or other subject of tax, and that such dual jurisdiction may result in double taxation, has been expressly recognized by the Supreme Court.[2]

---

[2]*Guaranty Trust Co. v. Virginia,* 305 U.S. 19, 59 S. Ct. 1, 83 L. ed. 16; *Curry v. McCanless,* 307 U.S. 357, 59 S. Ct. 900, 83 L. ed. 1339, stating as an accepted rule, by way of analogy to the case there in issue, that "income may be taxed both by the state where it is earned and by the state of the recipient's domicile" (p. 368); *Graves v. Elliott,* 307 U.S. 383, 59 S. Ct. 913, 83 L. ed. 1356.

When Congress enacted the Public Salary Tax Act of 1939,[3] that statute operated to remove any objection to the taxation of compensation of federal employees based upon the tax immunity of their employer. The legislation originated prior to the decision in *Graves v. People of New York ex rel. O'Keefe,* 306 U.S. 466, 59 S. Ct. 595, 83 L. ed. 927, which as held by this Court[4] in itself removed the objection.

By the Public Salary Tax Act, Congress left to the appropriate taxing authorities "having jurisdiction to tax", as stated in the Public Salary Tax Act, the matter of state and local taxation of federal salaries. The quoted words required that the taxing body have jurisdiction to impose income taxes and that the particular federal employee be within its taxing jurisdiction. *Rivera v. Buscaglia,* 146 F. (2d) 461, 465, citing the *Yerian* case.

While those states resting their taxing jurisdiction to impose income taxes upon the basis of domicile were not concerned with the place where the income was earned and hence were not concerned with the presence within their exterior boundaries of military and naval reservations of the United States, other states, and also cities, imposing income taxes which made the place where the income was earned the basis of taxing jurisdiction, soon found themselves concerned with the problem of classifying each military or naval reservation of the United States as within or

---

[3]53 Stat. 575, c. 59, s. 4, 5 U.S.C.A. 84a.
[4]*Yerian v. Territory, supra.*

without the state or city limits from the standpoint of legislative jurisdiction. Meanwhile the increasing reliance by the several states, and by many cities, upon sales and use taxes, intensified the problem.[5]

This problem of "enclaves", so called,[6] exists as to military and naval reservations in the several states, as distinguished from the territories. The situation as to territories is reviewed in the next point. A brief review of the decisions as to military and naval reservations in the several states will serve as background for the matters upon which Congress legislated in the Buck Act,[7] and also as background for Point II, *infra,* in which the authorities concerning territories are reviewed. While the stiuation which troubled the states prior to enactment of the Buck Act never existed in the territories (Point II, *infra*), fortunately Congress included the territories with the states in the Buck Act. Omission of the territories certainly would have led would-be litigants to argue that Congress intended, as to the territories, a policy contrary to that which the Buck Act legislated for the states.

"Enclaves" exist in the several states under and pursuant to Article I, Sec. 8, Cl. 17 of the Constitution, which prescribes that the Congress shall have power "to exercise exclusive legislation in all cases whatsoever, over such district as may * * * become the

---

[5]See Committee reports on the Buck Act, *infra.*

[6]*Sanders v. Oklahoma Tax Commission*, 197 Okla. 285, 169 P. (2d) 748, cert. den. 329 U.S. 780, 67 S. Ct. 202, 91 L. ed. 670.

[7]54 Stat. 1059, c. 787, approved Oct. 9, 1940, re-enacted as sections 105-110 of the new Title 4 of the United States Code by the Act of July 30, 1947, 61 Stat. 641, c. 389.

seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; * * *".

Prior to the Buck Act, lands purchased for a military reservation with the consent of a State did not lie within the State's territorial taxing jurisdiction. *Surplus Trading Co. v. Cook,* 281 U.S. 647, 50 S. Ct. 455, 74 L. ed. 1091. However, even before the Buck Act, the States could, and sometimes did, qualify their consent to a purchase by the United States so as to retain taxing jurisdiction. *James v. Dravo Contracting Co.,* 302 U.S. 134, 58 S. Ct. 208, 82 L. ed. 155; *Silas Mason Co. v. Tax Commission,* 302 U.S. 186, 58 S. Ct. 233, 82 L. ed. 187.

In instances where Article I, Sec. 8, Cl. 17 did not literally apply[8] complete jurisdiction was retained by States over military reservation lands, such instances being where (a) the reservations were not excepted from the jurisdiction of the State at the time of its admission, but were then in existence and hence not "purchased by the consent of the legislature of the state" within the meaning of the constitutional provision, or (b) the reservations were established on lands of the public domain of the United States, hence not "purchased by the consent of the legislature of the state", or (c) the reservations were acquired by emi-

[8]That Article I, Sec. 8, Cl. 17 is inapplicable in the territories is shown *infra,* Point II.

nent domain or otherwise without the consent of the state legislature. See *Surplus Trading Co. v. Cook, supra,* at pages 650-651 of 281 U.S. But even such retained jurisdiction later might be ceded by the states to the United States, reserving taxing jurisdiction (*Fort Leavenworth R. Co. v. Lowe,* 114 U.S. 525, 5 S. Ct. 995, 29 L. ed. 264) or not reserving taxing jurisdiction (*Standard Oil Co. v. California,* 291 U.S. 242, 54 S. Ct. 381, 78 L. ed. 775, *Yellowstone Park Transp. Co. v. Gallatin County,* 31 F. (2d) 644 (C.A. 9th, 1929, cert. denied, 280 U.S. 555, 50 S. Ct. 16, 74 L. ed. 611), dependent upon the exact terms of the cession by the particular state.

The lack of uniformity and the complexity attendant upon the administration of tax acts, with the law as to military reservations as it stood before the Buck Act, can readily be imagined. This led Congress to enact the Buck Act, entitled "An act to permit the States to extend their sales, use, and income taxes to persons residing or carrying on business, or to transactions occurring, in Federal areas, and for other purposes."[9]

The first section of the Act has to do with sales and use taxes, and enacts that "no person shall be relieved from liability * * * on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area." This section gives "full jurisdiction and power to levy and collect any such tax in any Federal area within such State

---

[9]54 Stat. 1059, c. 787, approved Oct. 9, 1940, re-enacted as sections 105-110 of the new Title 4 of the United States Code by the Act of July 30, 1947, 61 Stat. 641, c. 389.

to the same extent and with the same effect as though such area was not a Federal area."

The second section has to do with income taxes and similarly provides that "no person shall be relieved from liability * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area." This section, like the first, gives "full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

By Section 6 it is made clear what states are to benefit by the Act. It is there provided (subsection (e)) that:

> "* * * any Federal area, or any part thereof, which is located within the exterior boundaries of any State shall be deemed to be a Federal area located within such State." (Now part of Sec. 110(e) of the new Title 4 of the U. S. Code.)

As this provision is explained in Sen. Rep. No. 1625, 76th Cong. 3d Sess.:

> "Any Federal area, or any part thereof, which in located within the exterior boundaries of any State is deemed to be a Federal area within such State for the purposes of this act. For example, Yellowstone National Park is a Federal area which is located within the exterior boundaries of three States (Wyoming, Montana, and Idaho) and therefore, for the purposes of this act, that part of the Park which falls within the exterior boundaries of Wyoming will be included within Wyoming's taxing jurisdiction, that part which

> falls within Montana will be included within Montana's taxing jurisdiction, and that part which falls within Idaho will be included within Idaho's taxing jurisdiction."

Section 6 also contains definitions including a Territory in the term "State" (subsection (d)), and including taxes levied on gross income in the term "income tax" (subsection (c)).

Appellant argues that the Buck Act accomplished nothing. Congress stipulated in section 1 as to sales and use taxes, and in Section 2 as to income taxes, that the tax to which Congress consented must be levied by a State, or duly constituted authority therein, "having jurisdiction to levy such a tax". This is construed by appellant as meaning that the jurisdiction of the State must be sustained independently of all of the provisions of the Act. As to income taxes, appellant argues that the State must have domiciliary jurisdiction over him. As to sales and use taxes, these being based on territorial jurisdiction alone, it does not appear what independent ground of jurisdiction there could be. Of course it was not the intent of Congress to require that a state or other taxing authority have independent taxing jurisdiction, since that would strip the Act of meaning. The intent of this provision, i. e., "having jurisdiction to levy such a tax", both in Section 1 and Section 2, was to require that the state or other taxing authority have jurisdiction but for the specific grounds and reasons immediately folowing which in said Sections 1 and 2 are stated not to be objections to tax liability. Thus in

Section 1 it is required that the state or other taxing authority have jurisdiction to levy a sales or use tax but for the occurrence of the sale or use, in whole or in part, within a Federal area.[10] In Section 2 it is required that the state or other taxing authority have jurisdiction to levy an income tax but for the residence of the taxpayer, or the occurrence of the transactions or performance of the services from which the income is received, within a federal area.[11] By this means, as in the Public Salary Tax Act (Br. pp. 7-8), Congress limited its consent to the elimination of specific objections to state and local taxes. In the earlier Act the subject of the consent was the fact of employment by the United States. In the later Act, the subject of the consent was the fact of source of the tax in a federal area.

---

[10]Section 1 reads:

"(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

(Now Section 105(a) of the new Title 4 of the U.S. Code.)

[11]Section 2 reads:

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or servies performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area."

(Now Section 106(a) of the new Title 4 of the U.S. Code.)

In *Bowers v. Oklahoma Tax Commission,* 51 F. Supp. 652 (D.C. W.D., Okla. 1943), the Court, after quoting language in Section 1 of the Buck Act concerning sales and use taxes, which is identical to that used in Section 2 concerning income taxes, said:

"Language could hardly be more explicit."

In *Kiker v. City of Philadelphia,* 346 Pa. 624, 31 A. (2d) 289, cert. denied, 320 U.S. 741, 64 S. Ct. 41, 88 L. ed. 439, a case precisely in point upholding the levy of the gross income tax upon the salary of a non-resident derived from services performed in a federal area, the court said of the contention made by appellant in this case:

> "* * * Such a construction is the equivalent of saying that Congress merely intended to authorize the States to tax persons whom they were already permitted to tax. We cannot permit such an absurd construction to nullify this legislation. * * *"

The Court below said of the Buck Act:

> "It seems clear that the above Act was expressly designed to express the consent of the United States to the levy by the States and Territories of just such a tax as the one here involved against persons residing and employed just as the defendant resides and is employed, and that the Congress had authority to so consent for the United States."
>
> (Rec. 41.)

While it is hardly necessary to resort to the legislative history of the Buck Act, it is set forth below

for the convenience of the Court, should the Court wish to refer to it.

Initially the Buck Act was framed "to authorize the levy of State, Territory, and District of Columbia taxes upon, with respect to, or measured by sales, purchases, or use of tangible personal property * * * occurring in United States National Parks, military and other reservations or sites over which the United States government may have jurisdiction."

As so drawn the bill passed the House at the first session of the 76th Congress, and went to the Senate where it was referred to the Committee on Finance. That Committee reported it to the Senate with clarifying changes on July 28, 1939 (Sen. Rep. 1028, 76th Cong., 1st Sess.). The report states:

> "The purpose of the bill is to provide that State sales and use taxes shall apply with respect to transactions in Federal areas in the same manner and to the same extent as with respect to transactions outside such areas. * * * The bill will not affect any right to claim an exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred."

The report sets forth the report of the Committee on Ways and Means of the House, H. Rep. No. 1267, 76th Cong., 1st Sess., to the same effect.

After being so reported by the Senate Finance Committee on July 28, 1939 the bill encountered objections on the floor (see Vol. 84, Cong. Rec. Part 10, pp.

10685 and 10907, with respect to the effect of the bill as to Indian reservations).

It was recommitted to the Committee on Finance, was reported with amendments, and was enacted with these amendments.[12] As so reported by the Senate Committee (Sen. Rep. No. 1625, 76th Cong., 3d Sess.):

> "In general, the bill, as amended, proposes to do three things. First, it provides that State sales and use taxes (with certain exceptions which are hereafter explained) shall be applicable with respect to transactions occurring within Federal areas in the same manner and to the same extent as they are applicable with respect to transactions occurring outside such areas and within the State. Second, it provides that State income taxes shall be applicable with respect to persons residing within a federal area or receiving income from transactions occurring or services performed in such area in the same manner and to the same extent as they are applicable with respect to persons residing outside such area or receiving income from transactions occurring or services performed outside such area. Third, it contains certain clarifying amendments to section 10 of the Federal Highway Act of June 16, 1936 * * *"

The report then proceeds with "Detailed Explanation of the Bill", and as to Section 2 (now Section 106 of Title 4) has this to say:

> "Section 2(a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority

[12] Vol. 86, Cong. Rec. Part 11, pp. 12834-5; id., Part 12, p. 12998.

in a State, where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. One of the reasons for removing the above exemption is because of an inequity which has arisen under the Public Salary Tax Act of 1939. Under that act a State is permitted to tax the compensation of officers and employees of the United States when such officers and employees reside or are domiciled in that State but is not permitted to tax the compensation of such officers and employees who reside within Federal areas within such State. For example, a naval officer who is ordered to the Naval Academy for duty and is fortunate enough to have quarters assigned to him within the Naval Academy grounds is exempt from the Maryland income tax because the Naval Academy grounds are a Federal area over which the United States has exclusive jurisdiction, but his less fortunate colleague, who is also ordered there for duty and rents a home outside the Academy ground because no quarters are available inside, must pay the Maryland income tax on his Federal salary. Another reason for removing the above exemption is that under the doctrine laid down in James v. Dravo Contracting Co., 1937, 302 U. S. 134 [58 S. Ct. 208, 82 L. Ed. 155, 114 A.L.R. 318], a State may tax the income or receipts from transactions occurring or services performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such income or receipts if the transactions occurred or the services were performed in an area within the

> State over which the United States has exclusive jurisdiction."

Because of the importance attached by counsel for appellant to Section 4 of the bill, now Section 108 of the new Title 4 (Br. p. 8), the committee's report on this section is quoted below. Counsel for appellant apparently construes this section as nullifying all the remainder of the statute. All that it says is that the United States shall not be deemed to have been deprived of exclusive jurisdiction over Federal areas, where theretofore enjoyed, "for the purposes of any other provision of law", that is, laws other than the tax laws to which consent was given by the bill. The committee report says:

> "Section 4 of the committee amendment was inserted to make certain that the criminal jurisdiction of Federal courts with respect to Federal areas over which the United States exercises exclusive jurisdiction would not be affected by permitting the States to levy and collect sales, use, and income taxes within such areas."

The enactment of Title 4 of the United States Code was subsequent to the period involved in this case, and moreover in enacting Title 4 Congress made no change in the Buck Act. As stated in House Rep. No. 252, 80th Cong. 1st Sess., accompanying House Rep. No. 1566, which became the statute enacting Title 4, this House Report being repeated in Sen. Rep. No. 659 of the same session on the same bill, the purpose simply was to enact Title 4 into positive law, without material change. Thus it is stated by the Committee

on the Judiciary of the House and repeated by the Senate Committee on the Judiciary:

> "This bill is intended to codify and enact into positive law the various provisions of laws now contained in title 4 of the United States Code.
>
> "Under existing law these sections of title 4 of the United States Code are merely prima facie evidence of the law. They are taken from a number of acts and the Revised Statutes and are grouped together and classified for convenience
> * * *
> * * * * * * *
>
> "This bill takes each section of title 4 of the United States Code, 1940 edition, as of January 2, 1947 and without any material change enacts each section into positive law. No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill."

This policy of literal enactment of the existing law caused the Library of Congress to comment on Section 108 of the bill in its analysis of the bill, appended to the Senate Committee Report (Sen. Rep. No. 659, 80th Cong. 1st Sess., *supra*). It will be recalled that this was the section (originally Section 4) preserving the criminal jurisdiction of the United States notwithstanding the consent to exercise of state taxing jurisdiction given by the Buck Act. As reenacted the section still refers only to the provisions of the Buck Act, and does not refer to a law antedating the Buck Act, having to do specifically with gasoline taxes in federal areas, now Section 104 of Title 4. This

caused the reporter who made the analysis for the Library of Congress to comment on the difficulties of literal reenactment of laws in one code. Why opposing counsel referred to this Library of Congress analysis (Br. p. 8) does not appear.

II.

THE POWER OF THE TERRITORY OF HAWAII TO IMPOSE THE TAX IN QUESTION EXISTED EVEN IN THE ABSENCE OF THE PUBLIC SALARY TAX ACT OF 1939 AND THE BUCK ACT ENACTED IN 1940.

That the states and territories had power to tax federal salaries under the doctrine of *Graves v. O'Keefe, supra,* even in the absence of the Public Salary Tax Act, was held by this Court in the *Yerian* case.

As to the federal areas, no uniform rule would exist in the absence of the Buck Act, and to establish uniformity was the very purpose of that Act. Thus, in the several states, the scope of the taxing jurisdiction might or might not be as wide in the absence of the Buck Act as it is under that Act, dependent upon the circumstances as to the particular state and federal areas concerned.

This lack of uniformity existed before the Buck Act because whenever Article I, Sec. 8, Cl. 17 of the Constitution did not literally apply the State retained full jurisdiction over military and other federal reservations in the absence of a legislative cession of juris-

diction. (Supra, circa footnote 8). Of course the constitutional provision, which refers to states, does not literally apply in a territory of the United States, and the only question in a territory is what Congress intended.

The power of Congress is paramount over the entire area of a Territory.[13] In a state Congress must acquire, by reason of application of Article I, Sec. 8, Cl. 17 of the Constitution or by a cession of jurisdiction, the paramount position, as to one or more federal reservations, which Congress necessarily occupies as to the whole area of a Territory. Where such paramount position is acquired as to a particular federal reservation in a state there is no legislative authority but that of Congress, since Congress has not made it a practice to organize governments for such reservations. In the territories, Congress has exercised its paramount authority by organizing governments. The government so organized by Congress for the Territory of Hawaii is sovereign, subject only to the power of Congress to intervene, and it has all the taxing power which Congress itself could have exercised. *Kawananakoa v. Polyblank,* 205 U.S. 349, 27 S. Ct. 526, 51 L. ed. 834 (as to the character of the government); *Yerian v. Territory, supra; Rivera v. Buscaglia, supra,* 146 F. (2d) 461 (C.C.A. 1st, 1944); *Haavik*

---

[13]*Fort Leavenworth R.R. Co. v. Lowe,* 114 U.S. 525, 5 S. Ct. 995, 29 L. ed. 264 (Br. p. 11), states this well-settled rule in remarking that the issue of federal as distinguished from state jurisdiction over Fort Leavenworth only arose when Kansas was admitted as a state. The discussion in this part of the brief further develops this point.

v. Alaska Packers Ass'n, 263 U.S. 510, 513 (as to its taxing power).

This leaves only one question to be decided, that is, whether Congress organized the territorial government for the whole area of the Territory, or excluded the federal reservations.

In organizing the territorial government, Congress did not except from the jurisdiction thereof any federal reservation. Hawaiian Organic Act, 31 Stat. 141, c. 339, approved April 30, 1900. In the organization of a state government a similar failure to make an exception for the federal reservations would confer upon the state complete governmental authority. *Fort Leavenworth R. R. Co. v. Lowe, supra.* That there was at least one federal reservation in existence when the Hawaiian Organic Act was passed appears from *Territory v. Carter,* 19 Haw. 198, in which it was held that Congress had not excepted it from the jurisdiction of the Territory, nor had the legislature or Congress ever taken any action to except it from the jurisdiction of the Territory, and that the Territory had jurisdiction over the federal reservation, in this instance a naval reservation.

The Hawaii National Park Act is the only instance of action by Congress (or by the Legislature of the Territory) excepting land from the Territory's jurisdiction. This is the Act of April 19, 1930, 46 Stat. 227, c. 200, as amended, 16 U.S.C.A. 395. It provides:

> "Sec. 1. That hereafter sole and exclusive jurisdiction shall be exercised by the United States

> over the territory which is now or may hereafter be included in the Hawaii National Park in the Territory of Hawaii, saving, however, to the Territory of Hawaii the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed outside of said park, and saving further to the Territory of Hawaii the right to tax persons and corporations, their franchises and property on the lands included in said park. * * *''

It will be observed that Congress resumed its direct authority over the National Park "hereafter", recognizing that theretofore the National Park had been within the jurisdiction of the territorial government created by it. It will be observed, further, that Congress left in the territorial government taxing jurisdiction and certain other powers; a contrary policy as to other federal reservations within the Territory certainly cannot be found by mere implication. In the states, as well, the policy of Congress, even before the Buck Act, often has favored retention of taxing jurisdiction by the local government. See *Superior Bath House Co. v. McCarroll,* 312 U.S. 176, 61 S. Ct. 503, 85 L. ed. 721.

Appellant suggests that mere use by the federal government of land for military reservation purposes *ipso facto* ousts the Territory of jurisdiction (Br. p. 11). Here appellant departs from the argument of analogy to the rules of law governing federal reservations in the states and argues that ouster of territorial

jurisdiction can be effected by executive action. This contention was considered and denied by the Attorney General of the United States in an opinion of December 10, 1906, concerning the effect of an Executive Order creating a naval reservation in the Philippine Islands (26 Ops. Att'y Gen. 91). This opinion was cited by the Supreme Court of the Territory of Hawaii in *Cassels v. Wilder,* 23 Haw. 61, in upholding the taxing jurisdiction of the Territory over a privately owned automobile within Schofield Barracks.

In *Gromer v. Standard Dredging Company,* 224 U.S. 362, 370, 32 S. Ct. 499, 56 L. ed. 801, the Supreme Court of the United States cited the Attorney General's opinion in support of its conclusions. This case involved the question whether the Puerto Rico government had taxing jurisdiction over the harbor of San Juan in view of an exception of harbor areas from the transfer of public properties to the control of the Puerto Rico government made by the Foraker Act of April 12, 1900, and in view of a similar exception in the Act of July 11, 1902, which reserved from a grant made to the Puerto Rico government the harbor areas, army and navy reservations, and other reservations. The Supreme Court held that these exceptions and reservations were proprietary in nature and not limitations upon the exercise of government (p. 366 of 224 U.S.). In reaching this conclusion the Court stated the rule as to military and other reservations in the territories, and distinguished them from those in the states, as follows:

"The United States could have reserved government control and exercised it as it does in instances, by the consent of the States, over certain places in the States devoted to the governmental service of the United States. We do not think, as we have said, that the United States has done so, and that it has not is the view of the executive department of the Government as expressed through the Attorney General. The War Department entertained the same view as to military reservations in Porto Rico and also as to such reservations in the Philippine Islands.

"Section 12 of the Philippine Act placed all property rights acquired from Spain under the control of the island government for the benefit of its inhabitants, except 'such land or other property as shall be designated by the President of the United States for military and other reservations for the Government of the United States.' The extent of the power thus reserved was referred for consideration by the Secretary of War to the Attorney General, and in an opinion written by Solicitor General Hoyt and approved by Attorney General Moody it was held that the provisions granted and reserved property, but did not confer governmental jurisdiction. It was said in the course of the opinion, after referring to the provisions of the Philippine Act which directed that all laws passed by the Philippine Government should be reported to Congress and the reservation by Congress of the power to annul the same (a similar provision is in the Porto Rico Act),* that 'the relation of Congress to all terri-

*Congress has power to annul any act of the legislature of the Territory of Hawaii. *Inter-Island Steam Navigation Co. v. Territory of Hawaii,* 305 U.S. 306, 59 S. Ct. 202, 83 L. ed. 189.

> torial legislation is similar [certain organic acts of the States being cited], and thus it may be said that the exercise of local jurisdiction for ordinary municipal purposes over a reservation in a territory is valid until and unless disapproved by Congress' 26 Op. Atty. Genl. 91, 97." (pp. 370-371.)

The military reservation involved in this case is Hickam Field. In providing for Hickam Field Congress enacted:

> "That the Secretary of War is hereby authorized to cause condemnation proceedings to be instituted for the purpose of acquiring certain tracts of land in the vicinity of Fort Kamehameha Reservation, Territory of Hawaii, hereinafter described, for use as a flying field, and that a sum not exceeding $1,145,000 is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for the acquisition of the fee simple title to said land either by purchase or condemnation, * * *.' 45 Stat. 750, c. 754."

Certainly the provisions of this statute have to do solely with the title to the land involved, and the holding in *Gromer v. Standard Dredging Co., supra,* that such a proprietary enactment is not a limitation upon the exercise of taxing jurisdiction by the territorial government, is squarely in point.

The cases concerning territories sustain their taxing and other legislative jurisdiction over the reservations. In addition to *Territory v. Carter, supra,* and *Cassels v. Wilder, supra,* decided by the Supreme Court of

the Territory of Hawaii, see *Reynolds v. People,* 1 Colo. 179; *Rice v. Hammond,* 19 Okla. 419, 91 Pac. 698. In the argument of counsel in *Surplus Trading Co. v. Cook, supra,*[14] *Cassels v. Wilder* and *Rice v. Hammond* were cited[15] in support of the taxing jurisdiction of the state of Arkansas, but Camp Pike there involved, a reservation falling squarely within the provisions of Article I, Sec. 8, Cl. 17 of the Constitution, was distinguished by the Court from military reservations in the territories, which the Court placed in the same class as reservations in the states not falling under Article I, Sec. 8, Cl. 17 of the Constitution (examples of such reservations having been given by the Court, see supra circa footnote 8).

The opening brief cites *West v. West,* 35 Haw. 461, involving the establishment of domicile for purposes of divorce. Libelant was an enlisted man in the United States Navy. In holding he had acquired domicile in Hawaii the Court pointed out that he was not under orders as to the place of his residence, since he was permitted to choose his own abode and not required to live in assigned quarters. This had bearing on his intention to take up residence in Hawaii prior to the date when he changed his home address on his service record. The case has no bearing on the matter of legislative jurisdiction over military reservations, which is not even mentioned in the opinion. That the Court did not, in *West v. West,* overrule *Territory v. Carter* and *Cassels v. Wilder,* is obvious from its opinion in the case at bar (R. 39).

---

[14]281 U.S. 647, 652, 50 S. Ct. 455, 74 L. ed. 1091.
[15]74 L. ed. 1093.

CONCLUSION.

The decision of the Supreme Court of Hawaii affirming the judgment recovered by appellee for taxes in the amount of $237.35 should be affirmed by this Court.

Dated at Honolulu, Territory of Hawaii, January 14, 1949.

Respectfully submitted,

WALTER D. ACKERMAN, JR.,
Attorney General, Territory of Hawaii,
RHODA V. LEWIS,
Assistant Attorney General, Territory of Hawaii,
By RHODA V. LEWIS,
Assistant Attorney General, Territory of Hawaii,
Attorneys for Appellee.